No. 93-5770

In the

Supreme Court of the United States

October Term, 1993

ROBERT EDWARD STANSBURY,

Petitioner,

vs.

STATE OF CALIFORNIA,

Respondent.

On Writ Of Certiorari To The Supreme Court Of The State Of California

BRIEF OF PETITIONER

ROBERT M. WESTBERG*
(Appointed by This Court)
DAVID S. WINTON
JOSEPH A. HEARST
PILLSBURY MADISON & SUTRO
225 Bush Street
San Francisco, CA 94104
(415) 983-1000

Attorneys for Petitioner

*Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

May a trial court determine that a criminal defendant is not "in custody" for *Miranda* purposes on the basis of police officers' subjective and undisclosed conclusions that they did not consider the defendant a "suspect"?

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OPINION BELOW

The opinion of the Supreme Court of the State of California is reported at 4 Cal.4th 1017, 17 Cal.Rptr.2d 174, 846 P.2d 756 (1993) and is reprinted in the Joint Appendix ("J.A.") at pages 438-511. That court's May 26, 1993 orders modifying its opinion and denying rehearing are reported at 5 Cal.4th 294D (1993) and are reprinted in the Joint Appendix at pages 512-13.

JURISDICTION

The judgment of the California Supreme Court affirming petitioner's death sentence was entered on March 8, 1993. That court modified its opinion and denied rehearing on May 26, 1993. The petition for writ of certiorari was timely filed on August 24, 1993, within 90 days of that date. 28 U.S.C. § 2101(c); Sup. Ct. Rules 13.1, 13.4. This Court has jurisdiction to review the judgment and opinion by writ of certiorari pursuant to 28 U.S.C. section 1257.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment V, provides, in relevant part:

> No person shall . . . be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; . . .

United States Constitution, Amendment XIV, Sec. 1, provides, in relevant part:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Petitioner Robert E. Stansbury was convicted and sentenced to death for the kidnapping, rape and first degree murder of a ten-year-old girl, Robyn Jackson.[1] Clerk's Transcript ("C.T.") 1189. At his trial, statements allegedly made by petitioner during police questioning, without benefit of *Miranda* warnings, in the Pomona,

[1] Petitioner was convicted under California's 1978 death penalty law, which provides that the sentencer is to weigh aggravating and mitigating factors in making its penalty determination. *See* Cal. Penal Code § 190.3(a)-(k). On December 6, 1993, this Court granted certiorari in two cases that raise constitutional challenges to that law, *Tuilaepa v. California*, 93-5131, and *Proctor v. California*, 93-5161. The petitioners in those cases argue that the sentencing factors set forth in the California statute are unconstitutionally vague and thus fail adequately to channel the sentencer's discretion. In the California Supreme Court, petitioner unsuccessfully raised a virtually identical challenge to the California sentencing scheme. *See* J.A. 505, App. Opn. Br. 241-42. In the event that this Court decides the issue presented by the instant case adversely to petitioner, petitioner requests the Court to hold this case pending disposition of *Tuilaepa* and *Proctor*.

California, jail on the night after the murder were admitted in the prosecution's case in chief. Reporter's Transcript ("R.T.") 8293-301, 8399-402. The statements "were not merely used to impeach [petitioner's] trial testimony, but as substantive evidence of his guilt." J.A. 470. The jury was instructed that it could rely on the statements to show petitioner's consciousness of guilt. R.T. 11174-75.

On petitioner's automatic appeal, the California Supreme Court affirmed the convictions and sentence of death in all respects, concluding that petitioner's interrogation at the jail was not conducted in violation of *Miranda* because petitioner was not "in custody" when the statements were made. J.A. 507, *see* J.A. 468-77. Justice Kennard, indicating that she disagreed with the majority's view on an issue having to do with petitioner's right of self-representation, concurred in affirming petitioner's convictions solely "on the basis of stare decisis." J.A. 507. Justice Mosk dissented from the affirmance of the death sentence. J.A. 507.

Following the denial of rehearing by the California Supreme Court (J.A. 513), petitioner filed in this Court a petition for a writ of certiorari. On November 1, 1993, this Court granted the writ.

A. Statement of facts.

1. The initial police investigation.

Ten-year-old Robyn Jackson disappeared from the Geddes School playground near her home in Baldwin Park, California, at about 6:15 p.m. on September 28, 1982. J.A. 439. At about 1:30 a.m. the next morning, police

found her body in a drainage channel in Pasadena, several miles away. J.A. 440. Police had been called to Pasadena by a witness who reported seeing a motorist stop and throw something into the channel. J.A. 440.

Sergeant Thomas Johnston, a homicide detective with the Los Angeles County Sheriff's Department, began investigating the case at approximately 3:30 a.m. on September 29. J.A. 93. He learned from the police at the scene where the body was found that the car from which the body was thrown was a late 1960's or early 1970's mid-sized American sedan, turquoise in color. J.A. 93. The person dropping the body was described as a male adult, either large-framed or tall. J.A. 93-94.

From Baldwin Park police, Sergeant Johnston learned that Robyn had disappeared shortly after leaving her home after dinner around 6:15 p.m. J.A. 94. Sergeant Johnston spent the entire day of September 29 investigating the crime, including canvassing the neighborhood twice and interviewing witnesses. J.A. 96, 106. During that day he was informed by Robyn's mother, Sharon Sanchez, that Jeremy Ramos, a playmate of Robyn's who had eaten dinner at Robyn's house, had told Ms. Sanchez that Robyn had gone out after dinner for a "prearranged" meeting with a white man with red hair and a bushy red beard who drove a white ice cream truck (a description which applied to petitioner). J.A. 102-03, 168, 176-77. Sergeant Johnston also learned during the day of September 29 that this ice cream truck driver had been "particularly friendly" with Robyn in the past. J.A. 103.

Sergeant Johnston testified that Jeremy told the police that he had seen Robyn talking to the white ice

cream truck driver before dinner (about 5 p.m.) and that he had seen her after dinner near a blue ice cream truck. J.A. 169-70. A young man in the neighborhood, Donald Helmer, told Sergeant Johnston that he saw Robyn talking to a black man driving a blue ice cream truck before dinner at about 5:15 p.m. J.A. 103, 144.

Sergeant Johnston considered it possible that Robyn had been abducted by an ice cream truck driver, and he determined to contact petitioner and another ice cream man named Yusuf, known to have been in the neighborhood on that day. J.A. 103-04, 107, 130.[2]

Late in the afternoon of the 29th, Sergeant Johnston asked for a "rap sheet" on petitioner and Yusuf. J.A. 107. Johnston testified that the information he received in response did not reveal a criminal history for either person. J.A. 107-08, 129. In addition, Sergeant Johnston sent out two advance units to verify petitioner's and Yusuf's addresses and to look for turquoise cars in the vicinity. J.A. 68.

At least seven officers went to Yusuf's apartment. J.A. 33-34, 46, 215-16, 421. (Four of the officers had gone ahead as advance units in two cars and "stake[d] out" the apartment until Sergeant Johnston and others arrived. J.A. 217.) A woman at the apartment told Sergeant Johnston that Yusuf was not there. J.A. 111-12. Sergeant Johnston felt she was lying and directed some of the officers

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[2] Sergeant Johnston obtained petitioner's name from a Baldwin Park police officer who had been called to investigate a minor accident about 5:30 p.m. on September 28 when petitioner backed his truck into a fence not far from the Geddes School playground. J.A. 105, 108.

into the apartment. J.A. 112. The police searched each room and found Yusuf, according to one of the officers, "hiding under a bed." J.A. 48-50. Yusuf was "transported to the Pomona Police Department" for questioning. J.A. 51. Four officers in two cars were then dispatched to pick up petitioner. J.A. 52.

2. Petitioner's encounter with the police.

Shortly before 11 p.m. on September 29, four Baldwin Park police officers in two cars arrived at the trailer park where petitioner was staying. J.A. 42, 52. The officers had been told that petitioner was "wanted for questioning" in connection with a murder. J.A. 214, 219. All the officers drew their guns, fanned out around the doorway, and one of them, Officer Lee, knocked on the door. J.A. 52-55, 63-65, 207-14, 380-84. When petitioner answered, Lee asked him to identify himself and, after petitioner had done so, advised petitioner that they were investigating a homicide to which he was possibly a witness. J.A. 56, 384-85. The officer requested that petitioner accompany them to the Pomona, California, police station for questioning. J.A. 35-37, 56-57, 384-85. Petitioner was told that if he did not have transportation the police would provide it. J.A. 36, 56. No witness testified that petitioner was offered any choice whether to go to the police station. Petitioner agreed to accompany the officers. J.A. 37, 57.[3]

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[3] Officer Lee testified:

Q. . . . How did you ask him to come to the station?

A. I asked him if he would accompany me to the Pomona Police Department, and if he didn't have transportation I would provide it for him.

Q. And then what did he respond to that?

A. He was very cooperative, he said he didn't have transportation.

Q. And then you indicated you would drive him down in your unit?

A. Yes.

J.A. 56-57.

Officer Lee and another officer drove petitioner to the police station in Officer Lee's undercover police car, followed by the other two officers in a marked patrol car. J.A. 31, 37, 57, 385. During the ride to the police station, petitioner was asked, among other things, when he last drove his ice cream truck in Baldwin Park. J.A. 58-61.

3. The location and manner of questioning.

At the police station, the officers brought petitioner behind the station to the "sally port" and through the electronically controlled steel rolling gates that provided access into the jail. J.A. 61-62, 108-09, 400-01. All four officers then escorted petitioner through locked steel doors and into an interview room in the secured area of the jail itself. J.A. 62, 259-60, 401-04. This room, located directly across from the jail booking counter, was normally used for questioning suspects and persons in custody. J.A. 109-10, 115, 259-60, 401-02, 405-06. The door to this room could be opened only with a key. J.A. 260, 404. Three officers remained with petitioner while the fourth went upstairs to notify Sergeant Johnston. J.A. 40, 62-63. Johnston, who had just started to question the other ice cream truck driver, Yusuf, immediately broke off the questioning and came down to question petitioner. J.A. 73, 110, 320-21.

Johnston interrogated petitioner in the presence of a second officer, Detective Bell of the Baldwin Park Police Department. J.A. 74, 116. The questioning was not taped or otherwise recorded (J.A. 233-34), although Sergeant Johnston later wrote up a report of the interrogation (*see* J.A. 115, 250). Neither officer informed petitioner of his *Miranda* rights. J.A. 74, 233. There was no evidence that the officers informed petitioner that he could refuse to answer questions or that he was free to leave.

The questioning covered petitioner's movements and activities throughout the entire previous day, beginning with petitioner's travel from Pomona to Baldwin Park in the morning, the route he took and how he worked Baldwin Park. J.A. 75-77, 118, 130-31. Johnston also asked petitioner who he lived with and about cars to which he had access. J.A. 78, 86. In response to Johnston's questions, petitioner described how he had gotten to the neighborhood of the Geddes School and what he had done there. J.A. 76-77, 117-18, 130-31. He acknowledged that he had been in that neighborhood around the time Robyn disappeared. J.A. 76-77. Petitioner also described his route home from Baldwin Park, noting that he had taken a circuitous route to avoid certain hills because his ice cream truck had developed engine trouble, and that he had stopped for gas at a station on Arrow Highway. J.A. 77, 120-21, 250, 285-86.

Petitioner informed Johnston that he had arrived back at his trailer around 9:00 p.m., had dozed off watching television, and was awakened by a roommate, Loren Lucas, around midnight. J.A. 77. Petitioner stated that he had borrowed Lucas' car to go to a restaurant and had returned to the trailer at a late hour. J.A. 78.

Johnston then showed petitioner a photograph of Robyn. J.A. 81, 124-25, 133-35. Petitioner acknowledged that he had seen and spoken to her near the Geddes School around 6:00 p.m. on September 28. J.A. 81, 83, 134, 155. Johnston asked petitioner to describe his activities and route after that point and to describe other people he had seen on the street. J.A. 83-86, 134-35, 155-56. Petitioner did so, going "back over some of the day in more detail." J.A. 134.

After 20 to 30 minutes of questions, at "the end of the interview," Johnston asked petitioner to describe the car he had borrowed from Lucas around midnight. J.A. 133, 87, 124, 232, 264. Petitioner described Lucas' car as an older, turquoise, American-made model. J.A. 87, 138. According to Johnston, petitioner then became a "suspect" in Johnston's mind, since petitioner's description of the Lucas car matched the description of the car from which Robyn's body had been thrown. J.A. 87-89, 125-26, 137-39, 153.

Johnston then asked petitioner if he had a prior criminal record. J.A. 87, 137-39. When petitioner replied that he did and was presently on parole, Johnston went upstairs to inform the other homicide officers assigned to the case. J.A. 88-90. The officers returned to the interview room and read petitioner his *Miranda* rights. J.A. 91-92, 141. Petitioner asked for an attorney and was immediately arrested. J.A. 91-92, 141, 270.

B. The proceedings below.

Before trial, petitioner filed a motion to exclude his statements at the jail and any evidence discovered as a direct result of those statements. J.A. 3, 251-52. Under the law and procedure in effect at the time of the suppression hearing, the prosecution had the burden of proving that defendant was not in custody at the time of his statements and that his statements were admissible. *People v. Sam*, 71 Cal.2d 194, 201-02, 454 P.2d 700, 703-04, 77 Cal.Rptr. 804, 807-08 (1969); *see also Green v. Superior Court*, 40 Cal.3d 126, 134, 707 P.2d 248, 252, 219 Cal.Rptr. 186, 190 (1985), *cert. denied*, 475 U.S. 1087 (1986). A two-day evidentiary hearing was held at which the officers described the circumstances under which petitioner was picked up and interrogated. *See* J.A. 21-434. Petitioner did not testify. The trial court determined that, because petitioner had not become the "focus" of suspicion in the minds of the interrogating officers until he described the turquoise car, he was not "in custody" for *Miranda* purposes before that time. J.A. 433. Accordingly, the court excluded only those statements petitioner made after he described the car. J.A. 433, 435.

At trial, all but the excluded portion of petitioner's statements during the September 29 interrogation were admitted in the prosecution's case in chief. R.T. 8293-301, 8399-402. As the California Supreme Court pointed out, "[t]he statements were inconsistent with other prosecution evidence; they were not merely used to impeach

[petitioner's] trial testimony, but as substantive evidence of his guilt." J.A. 470.[4]

In affirming petitioner's conviction, the California Supreme Court held that the trial court had properly refused to suppress petitioner's statements made during his questioning at the jail and that the trial court's factual finding as to when petitioner became a suspect in the minds of the interrogating officers was supported by substantial evidence. J.A. 470-77.[5]

SUMMARY OF ARGUMENT

To dispel the compulsion inherent in custodial surroundings, and thereby reduce the risk of compelled self-incrimination, this Court held in *Miranda v. Arizona*, 384 U.S. 436 (1966) that an accused must be warned of his constitutional rights whenever he is subjected to custodial interrogation. In *Berkemer v. McCarty*, 468 U.S. 420,

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[4] Thus, for example, Sergeant Johnston testified that petitioner had said he had gone to a particular restaurant on the night of the crime. R.T. 8302-03. A waitress at the restaurant testified that, although petitioner was a regular customer, he had not been in the restaurant on the night in question. R.T. 8512-15. The jury was instructed that it could rely on the statements to show petitioner's consciousness of guilt (R.T. 11174-75), and the prosecution vigorously urged the jury to draw such an inference (R.T. 11424-29, 11431, 11445, 11447).

[5] Although petitioner submits that, in the circumstances of this case, any error affecting the jury's evaluation of his credibility was prejudicial, the California Supreme Court did not consider whether error in the trial court's *Miranda* ruling was prejudicial because it found no error. *See* J.A. 469 n.11.

442 (1984), this Court stated that the test of custody under *Miranda* is an objective one: whether a reasonable person in the suspect's position would have felt that his freedom of action had been restrained in a manner comparable to that of a formal arrest. Notwithstanding the clear directive of *Berkemer*, the state courts in the present case resolved the issue of custody on the basis of the subjective intent and uncommunicated suspicions of the police officers who brought petitioner to the Pomona, California, jail and interrogated him there.

The decisions of this Court and the lower courts teach that the objective circumstances most important in determining when custody attaches are: whether an accused's freedom of action has been restrained through a show of force or authority, whether the accused has been informed that he is not under arrest or not required to submit to questioning, whether the atmosphere of the questioning is police-dominated, and whether he is placed under arrest at the termination of the questioning. *See California v. Beheler*, 463 U.S. 1121, 1122, 1125 (1983) (per curiam); *Oregon v. Mathiason*, 429 U.S. 492, 495 (1977) (per curiam); *U.S. v. Griffin*, 922 F.2d 1343, 1348-55 (8th Cir. 1990).

The undisputed facts of this case, viewed in light of the foregoing factors, reveal that petitioner was subjected to custodial interrogation. Four police officers with drawn guns accosted petitioner at his home late at night, brought him to a small interview room in a secured area of the Pomona jail from which he was unable to leave without assistance, questioned him about his whereabouts and activities on the day of the crime, and arrested him at the conclusion of the questioning when he asked

for a lawyer. It is not claimed that, at any time before or during the questioning, petitioner was informed that he was not under arrest, that he need not submit to questioning, or that he was free to leave. Any reasonable person in these circumstances would have understood that he was in custody long before he was formally arrested.

The subjective standard for custody endorsed by the California Supreme Court is not only contrary to this Court's precedents, but also disserves the interests protected by *Miranda*. Since coercion must be determined from the perspective of the individual being questioned, a test for custody that conditions the requirement of warnings on the undisclosed intentions of the police does little to reduce the compulsion inherent in custodial surroundings. Moreover, such a standard would embroil the courts in disputes, often long after the fact, on the issue of a police officer's intent. Surely this Court, in adopting *Miranda's* "concrete constitutional guidelines" (384 U.S. at 442), did not contemplate that the custody issue would have to be resolved by mini-trials on a police officer's state of mind.

ARGUMENT

I. THE TEST OF CUSTODY FOR *MIRANDA* PURPOSES IS AN OBJECTIVE ONE THAT EVALUATES THE TOTALITY OF THE CIRCUMSTANCES FROM THE PERSPECTIVE OF A REASONABLE PERSON IN THE DEFENDANT'S POSITION.

A criminal defendant's right to the warnings required by *Miranda v. Arizona*, 384 U.S. 436 (1966) is

triggered whenever the individual is subjected to custodial interrogation, that is, "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." *Id.* at 444, footnote omitted. The Court in *Miranda* determined that, without adequate safeguards, the compulsion inherent in custodial surroundings undermines the Fifth Amendment privilege against self-incrimination by compelling an individual to speak "where he would not otherwise do so freely." *Id.* at 467. In requiring the now familiar *Miranda* warnings, the Court made it clear that it was concerned with the inherently coercive nature of questioning in an "incommunicado police-dominated atmosphere." *Id.* at 456.

While this Court has recognized that "the task of defining 'custody' is a slippery one" (*Oregon v. Elstad*, 470 U.S. 298, 309 (1985)), "the ultimate inquiry is simply whether 'there is a formal arrest or restraint on freedom of movement' of the degree associated with a formal arrest" (*California v. Beheler*, 463 U.S. 1121, 1125 (1983) (per curiam), *quoting Oregon v. Mathiason*, 429 U.S. 492, 497 (1977) (per curiam)). The formality of an arrest is not, however, a prerequisite to a finding of custodial interrogation. *U.S. v. Griffin*, 922 F.2d 1343, 1347 n.3 (8th Cir. 1990).

In the years following *Miranda*, some lower courts addressed the issue of custody by examining whether police suspicions had "focused" on the individual being questioned, even if those suspicions had not been communicated to him. In a series of decisions culminating in *Berkemer v. McCarty*, 468 U.S. 420 (1984), this Court laid to rest any doubt whether the subjective and undisclosed

perceptions of the police are relevant to the question when *Miranda* warnings must be given. In *Berkemer*, the officer who stopped a motorist on suspicion of drunken driving had decided from the outset that the motorist "would be taken into custody and charged with a traffic offense," but he "never communicated his intention" to the motorist. *Id.* at 442. This Court held that the officer's intent to arrest was irrelevant in determining whether the motorist was "in custody" for *Miranda* purposes:

> A policeman's unarticulated plan has no bearing on the question whether a suspect was "in custody" at a particular time; *the only relevant inquiry is how a reasonable man in the suspect's position would have understood his situation.*

Id. at 442 (emphasis added).[6]

II. IN DETERMINING THAT PETITIONER WAS NOT IN CUSTODY, THE COURTS BELOW INCORRECTLY FOCUSED ON THE INTERROGATING OFFICERS' UNDISCLOSED INTENT AND SUBJECTIVE SUSPICIONS.

Notwithstanding this Court's determination in *Berkemer* that custody is determined from the standpoint

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[6] *See also Beckwith v. United States*, 425 U.S. 341, 346 (1976) (it is "the *custodial* nature of the interrogation . . . 'and not the strength or content of the government's suspicions at the time the questioning was conducted' ", which determines whether *Miranda* warnings are required) (citations omitted); *Oregon v. Mathiason*, 429 U.S. at 495 (question whether *Miranda* warnings are necessary does not turn on whether "questioned person is one whom the police suspect"); *California v. Beheler*, 463 U.S. at 1125 (same).

of a "reasonable man in the suspect's position" (468 U.S. at 442), the trial court decided the issue of custody in this case primarily on the basis of a police officer's uncommunicated suspicions. At the conclusion of the hearing on petitioner's motion to suppress, the trial court made a single factual finding:

> I'm satisfied from Lieutenant Johnston's testimony that at the time that [petitioner] was brought into the station . . . the focus in [Johnston's] mind certainly was on the other ice cream driver. . . .
>
> [T]he focus I believe at the time that the interview [with petitioner] started was definitely on Yusuf [the other driver]. . . .
>
> [T]hen after [petitioner] made the comment about describing the turquoise automobile, . . . *that's when the focus shifted to [petitioner]. And all after that statement, starting with his past record will be excluded.*

J.A. 432-33 (emphasis added).

The California Supreme Court likewise determined the issue of custody in reliance on the degree of the interrogating officer's subjective suspicions and his undisclosed conclusion that, until petitioner described the turquoise car, he would have let him go if petitioner had so requested. J.A. 471-77. While the opinion below does mention factors that are relevant to the issue of custody, such as "the form of questioning" (J.A. 475) and the fact that petitioner "was interviewed in a locked room" (J.A. 473), the state supreme court, like the trial court, made the police officers' undisclosed intent and suspicions controlling. There is nothing to suggest that the court would have reached the same conclusion

regarding custody had it considered only those factors that are relevant under an objective test of custody.[7]

III. THE PROPER FACTORS TO BE CONSIDERED IN DETERMINING WHETHER INTERROGATION IS CUSTODIAL.

While *Berkemer* made it clear that the test of custody is an objective one, this Court has not addressed comprehensively the factors that should or should not be considered in determining whether a reasonable person would believe he was in custody. *Cf. Maine v. Thibodeau*, 475 U.S. 1144, 1145 (1986) (Burger, C.J., dissenting from denial of certiorari) (noting the "acute need for clarification of the proper factors to be considered in making the 'in custody' determination"). Nonetheless, the Court's decisions point the way to identifying the relevant circumstances.

From *Miranda* we know that warnings are required to dispel the compulsion and intimidation that are inherent in incommunicado police interrogations and which otherwise would undermine the privilege against self-incrimination. 384 U.S. at 467. Because the compulsion of

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[7] It appears that the California Supreme Court may have considered its review of the custody issue circumscribed by what it erroneously perceived to be the binding effect of the trial court's finding as to when petitioner became subject to custodial interrogation. J.A. 470, 474. The trial court's legal conclusion as to when custody attached was, however, based solely upon a factual determination regarding the time at which petitioner became the focus of the investigation in the mind of Sgt. Johnston. J.A. 432-33. Since that fact is irrelevant to the custody question, the California Supreme Court owed no deference to the trial court's finding on the custody issue.

incommunicado interrogation operates on the individual being questioned, the issues of custody and coercion are examined from the standpoint of that individual. This Court has so indicated. *E.g., Berkemer*, 468 U.S. at 442 ("the only relevant inquiry is how a reasonable man in the suspect's position would have understood his situation"); *Illinois v. Perkins*, 496 U.S. 292, 296 (1990) ("[c]oercion is determined from the perspective of the suspect").

The Court's decisions in *Oregon v. Mathiason*, 429 U.S. 492 (1977) (per curiam) and *California v. Beheler*, 463 U.S. 1121 (1983) (per curiam) also provide guidance. In those cases, the Court determined that the station house interviews of the defendants were not custodial where each defendant (1) contacted the police voluntarily in response to a request for information (*Mathiason*, 429 U.S. at 495), or initiated the contact himself (*Beheler*, 463 U.S. at 1122, 1125), (2) was expressly told prior to questioning that he was not under arrest (*Beheler*, 463 U.S. at 1122; *Mathiason*, 429 U.S. at 495), and (3) "did in fact leave the police station without hindrance" after the interview (*Mathiason*, 429 U.S. at 495; *Beheler*, 463 U.S. at 1121, 1122).

Similarly, in holding that roadside questioning during a routine traffic stop ordinarily is not inherently compulsive, and thus does not normally trigger the requirement of *Miranda* warnings, the *Berkemer* Court pointed out that: (1) the duration of a traffic stop "is presumptively temporary and brief" (468 U.S. at 437), (2) during a typical traffic stop the motorist and the police are exposed to public view (*id.* at 438), and (3) the motorist "typically is confronted by only one or at most two policemen" (*ibid.*).

The lower courts have looked to similar factors. Perhaps the most extensive analysis of the problem is Judge Battey's thoughtful opinion for the Eighth Circuit in *U.S. v. Griffin*, 922 F.2d 1343 (8th Cir. 1990), in which he formulated the following "nonexhaustive" list of factors to be considered in determining whether interrogation is custodial:

> (1) whether the suspect was informed at the time of questioning that the questioning was voluntary, that the suspect was free to leave or request the officers to do so, or that the suspect was not considered under arrest; (2) whether the suspect possessed unrestrained freedom of movement during questioning; (3) whether the suspect initiated contact with authorities or voluntarily acquiesced to official requests to respond to questions; (4) whether strong arm tactics or deceptive stratagems were employed during questioning; (5) whether the atmosphere of the questioning was police dominated; or, (6) whether the suspect was placed under arrest at the termination of the questioning.

922 F.2d at 1349.

Judge Battey characterized "the accused's freedom of action during the interrogation" as "a critical factor." *Id.* at 1348. He also observed that:

> the absence of police advisement that the suspect is not under formal arrest, or that the suspect is at liberty to decline to answer questions, has been identified as an important indicium of the existence of a custodial setting.

Id. at 1350.[8]

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[8] *See also U.S. v. Carter*, 884 F.2d 368, 372 (8th Cir. 1989) (defendant in custody where he "was not told that he was free to leave or that he did not have to answer questions"); *U.S. v.*

IV. APPLYING PROPER FACTORS TO THE IN-CUSTODY DETERMINATION, PETITIONER'S INTERROGATION WAS CUSTODIAL.

The undisputed facts of this case, viewed in light of the factors this Court and the lower courts have deemed relevant, demonstrate that petitioner was "subjected to treatment that render[ed] him 'in custody' for practical purposes." *Berkemer*, 468 U.S. at 440. Rejecting the police officer's subjective suspicions, as *Berkemer* requires, the evidence shows that petitioner was confronted at his home late at night by four police officers, with guns drawn and "in a ready position," and "invited" to accompany them (J.A. 209, 475); was brought to a small interview room in the Pomona jail from which he was unable to leave without assistance; was never informed that he was not under arrest or that he was free to leave; was continually in the presence of at least two officers except when alone in the interview room; was questioned by the police about his whereabouts and activities on the day of the crime; and was arrested when he asked for a lawyer. Any reasonable person in these circumstances would have understood that he was in custody long before he was formally arrested.

A. Petitioner's presence at the Pomona jail was obtained through an overwhelming show of force.

Petitioner first encountered the police on the date of his interrogation when he opened the door of his home at

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Beraun-Panez, 812 F.2d 578, 581 (9th Cir. 1987) (defendant in custody where he was not told he was free to leave); *compare United States v. Manglona*, 414 F.2d 642, 644 (9th Cir. 1969) (defendant not in custody where he "was specifically told that he was not under arrest and was free to terminate the interview at any time").

11:00 p.m. to find four police officers deployed around his doorway with drawn guns. J.A. 52-55, 63-65, 207-14, 380-84. Although the California Supreme Court states that petitioner "was invited, not commanded to come to the police station" for questioning (J.A. 474), a reasonable person confronted with such a display of force would not have felt at liberty to disregard such an "invitation":

> It goes without saying that the display of a weapon by police officers plainly conveys to a reasonable citizen the message that he is not free to leave; i.e., that his freedom of action is dramatically curtailed.

People v. Taylor, 178 Cal.App.3d 217, 229, 223 Cal.Rptr. 638, 644 (1976).[9]

The California Supreme Court asserts that the officers' guns were "out but not displayed" (J.A. 472), and maintains that "[t]here is no evidence [petitioner] saw the guns" (J.A. 476). Officer Lee testified, however, that all of

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[9] *Accord, United States v. Scharf*, 608 F.2d 323, 324 (9th Cir. 1979) (defendant in custody where he found his house surrounded by police officers "some of whom were holding weapons"); *State v. Petty*, 48 Wash.App. 615, 623-24, 740 P.2d 879, 884 (1987) ("[w]hen an officer draws a weapon in a confrontation with a suspect, it is a strong indication to the suspect that he is in custody"); *Miley v. United States*, 477 A.2d 720, 722-23 (D.C. App. 1984) (drawing a weapon constitutes an assertion of authority over the defendant and is a clear indication that the encounter between the defendant and the officer has "escalated beyond a general investigation"); *People v. Herdan*, 42 Cal.App.3d 300, 307 n.11, 116 Cal.Rptr. 641, 645 n.11 (1974) ("If the police officer uses physical restraint on the suspect . . . or draws a gun it is more likely to be deemed custodial than if the questioning occurs without physical restraint or opportunity to restrain") (citations omitted).

the officers' guns were drawn when petitioner answered the door, and the trial court made no finding that petitioner could not see the guns. J.A. 55, 63-65, 207-08, 381.

The opinion below also suggests that the officers merely drew their guns "for their own protection." J.A. 472. But such an undisclosed purpose could not have lessened the coercive impact of the encounter.[10] Nor, as the opinion appears to suggest, is it relevant that some of the officers "were not homicide investigators" (J.A. 472) or were "not involved in the investigation" (J.A. 471). There is no evidence that petitioner was aware of the officers' status or its significance.

The California Supreme Court also places great weight on the officers' testimony that they "had not been told to arrest [petitioner] if he refused" to accompany them (J.A. 472), and that they "would have honored [his]

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[10] *See Griffin*, 922 F.2d at 1354 (officer's need to escort defendant "for safety concerns" was not disclosed to defendant at the time and thus did not mitigate the restraint imposed by the officer's presence); *U.S. v. Camacho*, 674 F. Supp. 118, 122-23 (S.D.N.Y. 1987) (the fact that conditions imposed on defendant by officers were "essential" for their own protection "does not change the fact that [such] restrictions . . . would have led a reasonable person under the circumstances to believe that he was not free to go"); *Petty*, 48 Wash.App. at 624 n.4, 740 P.2d at 884 n.4 (the "coercive environment created by the drawn weapons" rendered defendant in custody notwithstanding that "[s]afety concerns . . . ma[de] such an approach absolutely necessary"); *Moss v. State*, 823 P.2d 671, 674 (Alaska Ct. App. 1991) (court noted that the "amount of force" used by the police in serving a search warrant and maintaining control over the premises "tend[ed] to establish custody" "even though it [was] necessary and justifiable" under the circumstances).

refusal to come to the station" (J.A. 474). It was not claimed that petitioner was ever told that he could refuse to accompany the officers or to submit to questioning.[11]

These facts are in complete contrast to those in *Oregon v. Mathiason* and *California v. Beheler*, upon which the court below relied. J.A. 476. The defendant in *Mathiason* "came voluntarily to the police station" after he had contacted the police by telephone in response to a note left by an officer at his home. 429 U.S. at 495. Similarly, the defendant in *Beheler* himself initiated the first encounter with the police. 463 U.S. at 1122, 1125. Moreover, both defendants were specifically told that they were not under arrest. *Beheler*, 463 U.S. at 1122; *Mathiason*, 429 U.S. at 493, 495.

B. Petitioner was questioned in a locked room at the jail cut off from the outside world, with all the earmarks of the incommunicado, police-dominated atmosphere described in *Miranda*.

Although we submit that petitioner was in custody for *Miranda* purposes from the moment he was confronted by four armed police officers, the restraints on his freedom of action only increased thereafter. He was driven with two officers not to the public section of the

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[11] Moreover, although the officers testified that petitioner was merely a "possible witness" (J.A. 56), they did not testify that they offered petitioner the opportunity to be questioned at his residence or to contact the police on his own later to set up an interview.

police station but to the jail proper.[12] J.A. 37, 57, 385. Petitioner was escorted by four officers through locked steel doors, and deposited in a small "locked interview room in the secure area of the jail." J.A. 473, *see* J.A. 61-62, 108-09, 400-01. This room was normally used for questioning suspects and persons "who were already in custody" or "were going to be" placed in custody. J.A. 405-06.

The California Supreme Court attempts to downplay the custodial aspects of this environment by explaining that the officers brought petitioner into the jail because they were unfamiliar with the Pomona police station and "had experienced difficulties and delays in using the nonsecure area" to question the other ice cream truck driver. J.A. 472. This analysis disregards this Court's admonition that the only relevant inquiry is how a reasonable man in the suspect's position would have understood his situation. *Berkemer*, 468 U.S. at 422; *see also United States v. Kennedy*, 573 F.2d 657, 660 (9th Cir. 1978)

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[12] The California Supreme Court states that petitioner "was given the option of driving himself" to the station. J.A. 474. Petitioner was in fact asked to "accompany" the officers to the station and told that if he did not have his own transportation, it would be provided for him. J.A. 36, 56. There is no evidence that the police intended to allow petitioner to drive himself anywhere unescorted.

Nor does the fact that petitioner was not handcuffed during his ride to the station mean that he was not in custody. " '[F]or one to be in custody, it is not required that he be in handcuffs.' " *United States v. Bekowies*, 432 F.2d 8, 12 (9th Cir. 1970), *quoting Rosario v. Territory of Guam*, 391 F.2d 869, 872 (9th Cir. 1968); *State v. Godfrey*, 131 N.J.Super. 168, 175, 329 A.2d 75, 78-79 (N.J.Super.A.D. 1974).

(agents' testimony that they questioned defendant in their vehicle because of cold weather and would have let him go at any time not determinative of custody where defendant "was not made aware of the agents' subjective purposes for the questioning" or their intent to release him).

As the California Supreme Court notes, petitioner could not have left the interview room (or even the secured area in which it was located) without the officers' assistance. J.A. 473. The opinion below states, however, based on the officers' testimony, that "[n]either of [the officers] considered [petitioner] to be in custody" (J.A. 473) and "would have let him go during questioning if he had so requested" (J.A. 474). Again, the analysis improperly focuses on the officers' subjective and undisclosed intent, contrary to *Berkemer*. From petitioner's standpoint, the police were in complete control.[13]

The California court's analysis, moreover, rests on a dangerous assumption. An assertion that the police would have backed down and released petitioner had he refused to accompany them to the police station or refused to be questioned is incapable of being tested after the fact. It is only tested if a suspect refuses to accede to a police show of force or refuses to be interrogated. The

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[13] *See United States v. Wauneka*, 770 F.2d 1434, 1438-39 (9th Cir. 1985) (defendant reasonably could have believed that he was in custody where he had no transportation and "he was never offered an opportunity to leave"); *compare Green v. Superior Court*, 40 Cal.3d at 131, 219 Cal.Rptr. at 188, 707 P.2d at 250 (defendant not in custody where he was explicitly told that he would be returned to his workplace on request).

California court's analysis, however, implies that the police have no obligation to inform a citizen of his constitutional rights unless the citizen has first challenged the authority of the police and they have overcome his resistance. In the circumstance of this case, this would mean that a citizen who has four policemen at his door, in the middle of the night with guns drawn, who "invite" him to the police station for questioning, must question or challenge their purpose and authority and, if no challenge is made, the police have no obligation to give a *Miranda* warning. There is no justification for placing this risk and burden on the citizen.

The court below also noted that petitioner was questioned for "a brief 20 or 30 minutes" (J.A. 475 n.12), implying that the duration of the interrogation demonstrates that it was noncustodial. However, "the length of the interrogation" is generally regarded as an "undeterminative factor in the analysis of custody." *Griffin*, 922 F.2d at 1348. Here, petitioner was questioned by the police in detail about his activities before, during and after a kidnapping and murder. The questioning ended when it did only because petitioner was finally given *Miranda* warnings and asked for an attorney. He was then immediately arrested and booked. J.A. 91-92.

C. There is no evidence or claim that petitioner was ever informed that he had a choice whether to accompany the officers or to be interrogated.

Despite the police officers' testimony that they considered petitioner free to refuse to accompany them to the station or to refuse to be questioned, they never adopted

"[t]he most obvious and effective means of demonstrating that a suspect has not been 'taken into custody or otherwise deprived of . . . freedom of action' . . . [by] inform[ing] the suspect that an arrest is not being made and that the suspect may terminate the interview at will." *Griffin*, 922 F.2d at 1349, *quoting Miranda*, 384 U.S. at 1612. The police officers' undisclosed willingness to release petitioner certainly would have no relevance to a reasonable person in his position.

D. Petitioner's arrest at the close of the interview is a further indicium of custody.

The fact that petitioner was arrested following the questioning does not necessarily prove that he was in custody before that point. Nonetheless, the subsequent arrest colors what went before, and it would be difficult to say that it would be unreasonable for one in the suspect's position to believe himself in custody when, as it turns out, he is placed in formal custody. *Bekowies*, 432 F.2d at 14; *see also*, *Griffin*, 922 F.2d at 1355. Here, petitioner's arrest after he finally received *Miranda* warnings simply gave a formal imprimatur to custody that, as a practical matter, had already attached.

V. A TEST FOR CUSTODY THAT TURNS ON THE SUBJECTIVE INTENT OF THE POLICE DISSERVES THE INTERESTS PROTECTED BY *MIRANDA* AND WOULD BE INEFFICIENT AND IMPRACTICAL TO ADMINISTER.

As this Court has explained, the primary purposes of the *Miranda* safeguards are:

> to relieve the " 'inherently compelling pressures' " generated by the custodial setting itself, " 'which work to undermine the individual's will to resist,' " and as much as possible to free courts from the task of scrutinizing cases to try to determine, after the fact, whether particular confessions were voluntary.

Berkemer, 468 U.S. at 433 (citations omitted).

A subjective standard for determining custody such as that applied to petitioner in the present case is neither faithful to the concerns that motivated the Court's decision in *Miranda* nor susceptible of easy application by the police and the courts.

A test for custody that hinges on the subjective and undisclosed intentions of the police fails to recognize what was implicit in *Miranda* and made explicit in later cases: that "[c]oercion is determined from the perspective of the suspect." *Illinois v. Perkins*, 496 U.S. 292, 296 (1990). Simply stated, "[t]he threat to a citizen's Fifth Amendment rights that *Miranda* was designed to neutralize has little to do with the strength of an interrogating officer's suspicions." *Berkemer*, 468 U.S. at 435 n.22.[14]

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[14] *See also United States v. Hall*, 421 F.2d 540, 544 (2d Cir. 1969), *cert. denied*, 397 U.S. 990 (1970) (noting that a test for custody which conditions the requirement of warnings on the inner intentions of the police "fail[s] to recognize *Miranda*'s concern with the coercive effect of the 'atmosphere' from the point of view of the person being questioned"); *Hunter v. State*, 590 P.2d 888, 897 n.35 (Alaska 1979) (rejecting a standard "based on the officer's 'unexpressed intent' " since "the officer's undisclosed intent cannot affect the suspect's perceptions").

Moreover, a subjective standard for custody would be difficult to administer. As this Court has explained, "[a] major purpose of the Court's opinion in *Miranda* . . . was 'to give concrete constitutional guidelines for law enforcement agencies and courts to follow.' " *Arizona v. Roberson*, 486 U.S. 675, 680 (1988) (citations omitted); *see also Berkemer*, 468 U.S. at 430, *citing Fare v. Michael C.*, 442 U.S. 707, 718 (1979) ("[o]ne of the principal advantages" of the *Miranda* doctrine "is the clarity of that rule"). Conditioning the requirement of warnings on the officer's inner suspicions would require the officer "constantly to monitor the information available to him to determine when it becomes sufficient to [make the accused a suspect]." *Berkemer*, 468 U.S. at 435 n.22; *accord Hunter*, 590 P.2d at 897 n.35 (a subjective test for custody "offers no guidance to police officers because it makes the officer's own conditional intent the standard for when he or she should give *Miranda* warnings").

Such a standard would also be unwieldy for the courts to apply, since the question of custody would be " 'dependent either on the self-serving declarations of the police officers or the defendant.' " *Berkemer*, 468 U.S. at 442 n.35, *quoting People v. P.*, 21 N.Y.2d 1, 9-10, 233 N.E.2d 255, 260 (1967). As one court has aptly observed, application of a subjective standard would embroil the courts in

> swearing contests in which officers would regularly maintain their lack of intention to assert power over a suspect save when the circumstances would make such a claim absurd, and defendants would assert with equal regularity that they considered themselves to be significantly deprived of their liberty the minute officers began to inquire of them.

Hall, 471 F.2d at 544.

The instant case is a good example of the difficulties in applying a custody standard based on the inner intentions of the police. The suppression hearing, which took place more than two years after petitioner's interrogation, turned into a mini-trial on the extent to which Sergeant Johnston had, or might have, "focused" his suspicions on petitioner prior to the interrogation. Since Johnston was engaged in an on-going investigation at the time of the interrogation, the lower court's approach to the custody issue meant that he had to attempt, two years after the fact, to reconstruct what he knew or had heard prior to the interrogation and to separate that information from what he learned or heard later. Sergeant Johnston had difficulty reconstructing such a state of mind. *See, e.g.*, J.A. 177-87. Surely, this Court, in adopting the bright line rule of *Miranda*, did not contemplate mini-trials on the question of custody to turn upon the policeman's memory of *his* state of mind at particular points in a crime investigation. *See Griffin*, 922 F.2d at 1355.

The objective "reasonable person" test articulated in *Berkemer* and *Griffin*, by comparison, gives the police and the courts relatively clear and objective criteria by which to determine whether, in circumstances short of formal arrest, an individual is in custody for *Miranda* purposes. By making the reactions of a *reasonable* person the controlling inquiry, the objective test relieves police of " 'the burden of anticipating the frailties or idiosyncracies of every person whom they question.' " *Berkemer*, 468 U.S. at 442 n.35, *quoting People v. P.*, 21 N.Y.2d at 9-10, 233 N.E.2d at 260 (1967); *see also Beraun-Panez*, 812 F.2d at 581. The objective test likewise gives the courts a workable standard for determining custody that can be applied without

creating a "finespun new doctrine . . . complete with [] hair-splitting distinctions." *New York v. Quarles*, 467 U.S. 649, 663-64 (1984) (O'Connor, J., concurring and dissenting).

Application of the objective standard consistent with *Berkemer* and *Griffin* compels the conclusion that petitioner's interrogation was custodial.

CONCLUSION

For the foregoing reasons, the judgment of the Supreme Court of California should be reversed.

ROBERT M. WESTBERG*
(Appointed by This Court)
DAVID S. WINTON
JOSEPH A. HEARST
PILLSBURY MADISON & SUTRO
225 Bush Street
San Francisco, CA 94104

Attorneys for Petitioner

*Counsel of Record